

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No.: 2:17-cv-1560-JAD-CWH

David Frahn,

Plaintiff

V.

David Lee Phillips, Esq., et al,

Defendants

Order Dismissing Case

The Rules of Civil Procedure give a plaintiff 90 days to serve a summons and complaint and require the plaintiff to file proof of that timely service on each defendant.¹ David Frahn commenced this case against three defendants—David Lee Phillips, Esq., Charles Brown, and David Lee Phillips & Associates—on June 2, 2017, and he still has not filed proof of service of the summons and complaint on any defendant.² On September 18, 2017, the Clerk of Court sent plaintiff a notice that his claims would be dismissed without prejudice for any defendant he failed to file proof of service on by October 18, 2017.³ I reminded him of that deadline when I denied his motion for default on October 5, 2017.⁴

Frahn's failure to file notices demonstrating that process was lawfully served on any defendant in this case compels the dismissal of this action. Rule 4(m) states, "If a defendant is

¹ Fed. R. Civ. P. 4. Rule 4(c)(1) further makes it clear that “[t]he plaintiff is responsible for having the summons and complaint served within the time allowed under Rule 4(m).”

² Although plaintiff attached a proof of service to his motion for default against defendant David Lee Phillips Esq., ECF No. 6 at 7, as I explained in the order denying that motion, the proof demonstrates that service was defective. *See* ECF No. 7.

³ ECF No. 5.

⁴ ECF No. 7.

1 not served within 90 days after the complaint is filed, the court—on motion or on its own after
2 notice to the plaintiff—**must dismiss** the action without prejudice against that defendant or order
3 that service be made within a specified time.”⁵ Frahn has been twice warned that his failure to
4 file proof of service by October 18, 2017, would cause his case to be dismissed. Although he
5 filed proof of service on defendant David Lee Phillips, Esq., as an exhibit to a motion before the
6 deadline expired, that proof only demonstrated that he served Phillips’s personal summons and
7 complaint on the secretary at Phillips’s place of business, which is not an authorized method of
8 service under the rules.⁶

9 District courts have the inherent power to control their dockets and “[i]n the exercise of
10 that power, they may impose sanctions including, where appropriate, . . . dismissal” of a case.⁷ A
11 court may dismiss an action based on a party’s failure to prosecute an action, failure to obey a
12 court order, or failure to comply with local rules.⁸ In determining whether to dismiss an action
13 for lack of prosecution, failure to obey a court order, or failure to comply with local rules, the
14 court must consider several factors: (1) the public’s interest in expeditious resolution of
15 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to the defendants;
16 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less
17 drastic alternatives.⁹

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19 ⁵ Fed. R. Civ. P. 4(m).

20 ⁶ See Fed. R. Civ. P. 4(e).

21 ⁷ *Thompson v. Hous. Auth. of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986).


22 ⁸ See *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with
23 local rule); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992) (dismissal for failure to
24 comply with an order requiring amendment of complaint); *Carey v. King*, 856 F.2d 1439,
25 1440–41 (9th Cir. 1987) (dismissal for failure to comply with court order); *Henderson v.*
26 *Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for lack of prosecution and failure to
comply with local rules).

27 ⁹ *Thompson*, 782 F.2d at 831; *Henderson*, 779 F.2d at 1423–24; *Malone*, 833 F.2d at 130;
28 *Ferdik*, 963 F.2d at 1260–61; *Ghazali*, 46 F.3d at 53.

1 I find that the first two factors weigh in favor of dismissing this case. The risk-of-
2 prejudice factor also weighs in favor of dismissal because a presumption of injury arises from the
3 occurrence of unreasonable delay in filing a document ordered by the court or prosecuting an
4 action.¹⁰ A court's warning to a party that failing to obey the court's order or comply with a rule
5 will result in dismissal satisfies the consideration-of-alternatives requirement,¹¹ and Frahn was
6 expressly warned that dismissal could result if he failed to provide proof of service by the
7 October 18th deadline; he was also advised that the court did not consider the lone proof he had
8 provided to be proper.¹² Although the fourth factor weighs against dismissal, it is greatly
9 outweighed here by those favoring dismissal.

10 Accordingly, IT IS HEREBY ORDERED that **this action is DISMISSED** without
11 prejudice for failure to provide timely proof of proper service on any defendant. The pending
12 Motion for Summary Judgment [ECF No. 10] is **DENIED** as moot. **The Clerk of Court is**
13 **directed to CLOSE THIS CASE.**

14 Dated this 5th day of January, 2018.

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16 U.S. District Judge Jennifer A. Dorsey
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25 ¹⁰ *Anderson v. Air West*, 542 F.2d 522, 524 (9th Cir. 1976).
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27 ¹¹ *Ferdik*, 963 F.2d at 1262; *Malone*, 833 F.2d at 132–33; *Henderson*, 779 F.2d at 1424.

28 ¹² See ECF Nos. 5, 7.